

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

76-7403-40

UNITED STATES COURT OF APPEALS
For the Second Circuit

Docket Nos. 76-7403, 76-7440

CONTEMPORARY MISSION, INC.,

Plaintiff-Appellee-
Cross-Appellant

-against-

FAMOUS MUSIC CORPORATION,

Defendant-Appellant-
Cross-Appellee

PARAMOUNT PICTURES CORPORATION
and GULF + WESTERN CORPORATION,

Defendants.

On Appeal From The United States District Court
For the Southern District of New York

BRIEFS OF PLAINTIFF-APPELLEE-
CROSS-APPELLANT CONTEMPORARY MISSION, INC.

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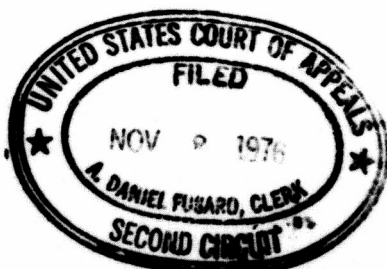


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BRIEFS OF PLAINTIFF-APPELLEE-
CROSS-APPELLANT CONTEMPORARY MISSION, INC.

STATEMENT OF ISSUES PRESENTED
FOR REVIEW

This is an appeal by defendant Famous Music
Corporation (hereinafter, "Famous") from a jury verdict

rendered against it and in favor of plaintiff Contemporary Mission, Inc. (hereinafter "Mission") on May 28, 1976 in the United States District Court for the Southern District of New York, before the Hon. Richard Owen.

Issue 1. Whether in determining that Famous caused damage to plaintiff by breaching what is called the Virgin contract, the jury properly weighed all of the evidence presented to it under its duty to evaluate conflicting testimony and the credibility of witnesses

Issue 2. Whether that part of the verdict dealing with what is called the Crunch contract should be affirmed in all respects; namely,

- that the trial court properly determined either that notice to Famous regarding breach was fruitless or that notice actually given by plaintiff to Famous was sufficient
- that testimony concerning ABC's non-assumption of any duties under the Crunch agreement was properly admitted for the purpose of proving non-assumption and was sufficient to support the jury's verdict against Famous
- that without prejudicing its rights to sue for damages, plaintiff was entitled to notify all parties thereto that the sale of Famous materially breached plaintiff's contracts

STATEMENT OF CASE

A. Nature of the Case

In November 1974, plaintiff Contemporary Mission, Inc. commenced this action against defendant Famous Music Corporation for breach of contracts covering the so-called "Virgin" and "Crunch" musical recordings. Plaintiff also sued defendants Gulf + Western Industries, Inc. (hereinafter, "G+W") and Paramount Pictures Corporation (hereinafter, "Paramount") for wrongfully inducing Famous to breach its contracts with plaintiff by selling the Recording Division of its business in utter disregard of its agreements and business relationship with Mission.

B. Course of Proceedings

After extensive discovery, the parties filed a pre-trial order in November, 1975. In February 1976, after hearing oral arguments on plaintiff's motion for a trial preference, Judge Richard Owen set a trial date of April 19, 1976, which was subsequently rescheduled for May 10, 1976. On April 23, 1976, defendants moved for partial summary judgment, which was denied in all respects. (R-56)*. Trial by jury commenced on May 10, 1976.

* The letter "R" followed by a number will indicate the document referred to from the record on appeal.

Rulings Below

During trial, Judge Owen dismissed all causes of action pleaded against defendants G + W and Paramount. This ruling has not been appealed by the parties. The Court dismissed the seventh cause of action, which pleaded the conversion of a large quantity of musical recordings by Famous. Plaintiff has not appealed this ruling because defendant Famous agreed to return the recordings to Mission. Judge Owen also refused to permit any testimony concerning prospective damages suffered by plaintiff resulting from the wrongful sale of the Record Division of Famous to ABC Records, Inc. (hereinafter, "ABC"), stating that the jury would have to engage in the "highest form of speculation" in order to award damages thereon. (A- ; T-1829-30)*. In its main brief on cross-appeal infra plaintiff Contemporary Mission, Inc. asks this Court to set aside this ruling.

During his instructions, Judge Owen charged the jury as a matter of law that Famous breached the "Virgin" contract by assigning it to ABC on July 31, 1974

* The letter "A" followed by a number indicates the page reference from the Joint Appendix; the letter "T" refers to the transcript.

without getting from ABC a written agreement to be bound by the terms of the agreement which plaintiff had with Famous. (A- ; T-2398). The Court further charged as a matter of law that after the assignment of the "Crunch" agreement by Famous to ABC, Famous remained liable for any obligations thereunder (A- ; T-2399).

Verdict Below

The Court submitted the case to the jury in two parts, the first portion as to liability and the second concerning damages. The Court's questions and the jury's answers as to liability and damages are set forth below:

Liability Questions

1. Has plaintiff established by a fair preponderance of the credible evidence that Famous breached the Virgin agreement by failing to adequately promote Virgin in its various aspects as it had agreed? Yes
2. If you find a failure to adequately promote, did that cause plaintiff any damage? Yes
3. Did the assignment of the Virgin contract by Famous to ABC cause any damage to plaintiff? Yes
4. Did plaintiff establish by a fair preponderance of the credible evidence that Famous failed to use "its reasonable efforts consistent with the exercise of sound business judgement" to promote the records marketed under the Crunch label? No

5. Did plaintiff establish by a fair preponderance of the credible evidence that there was a refusal by ABC to perform the Crunch contract and promote plaintiff's music after the assignment? Yes
6. If your answer is "yes" to either 4 or 5 above, did such a breach or breaches of the Crunch agreement cause plaintiff any damage? Yes
7. Did Tony Martell, on behalf of Famous, in talking to any member of plaintiff, make an agreement to reimburse plaintiff for the expense of its members promoting their music around the country? Yes

Damage Questions

1. To what damages is plaintiff entitled under the Virgin Agreement? \$ 68,773*
2. To what damages is plaintiff entitled under the Crunch Agreement? \$104,751
3. To what unallocated damages as between the Virgin and Crunch and oral Agreements is plaintiff entitled- if any? \$ 21,000
4. To what damages, if any, is plaintiff entitled under the oral agreement? \$ 16,500

Pursuant thereto judgment was entered on June 30, 1976 in the amount of two hundred and eleven thousand and twenty-four dollars (\$211,024.00) together with interest

* This amount of damages has been incorrectly stated in Famous' brief as \$58,473 (page 6) and \$63,473 (page 2)

at the rate of 6% per annum from and after July 31, 1974, with costs to be taxed.

Post Judgment Ruling

Thereafter, on July 8, 1976 Famous moved for judgment notwithstanding the verdict, raising in detail each point which is now raised in this appeal. On July 16, 1976 the Court denied this motion in all respects. (R-63).

C. Statement of Facts*

1. The Parties

Contemporary Mission, Inc. is comprised of a small group of priests who foster their apostolate of religious communication in part by writing, producing and publishing musical compositions and recordings. Prior to July 31, 1974, Famous was engaged in the business of recording, producing, manufacturing, publishing, promoting, distributing, and selling phonograph recordings of musical compositions. Defendant was and still is engaged in the business of publishing musical compositions. Famous and Paramount are wholly-owned subsidiaries of G+W, and are part of the Leisure Group of the G + W conglomerate.

* Since the facts are set forth as background material only, no references to the Joint Appendix or trial transcript are made herein, but shall be included where appropriate in the Argument infra.

2. The Virgin Agreement

In 1972 plaintiff owned all rights in an original dramatico-musical work entitled VIRGIN, created and composed by Father John T. O'Reilly, a vice-president and member of Mission. Father O'Reilly produced a master tape recording of VIRGIN at plaintiff's expense, after which he contacted and negotiated with several record companies concerning the sale of the rights in that work, which was to be a two-record album.

The proposals made by one of the companies contacted, namely, defendant Famous Music Corporation, were of particular interest to plaintiff because Famous' president, Tony Martell, was generally regarded within the recording industry as the person primarily responsible for the successful distribution of JESUS CHRIST SUPERSTAR and TOMMY, two so-called "concept" rock operas in the same general mold as VIRGIN. This factor, together with the obvious enthusiasm of the people at Famous for the project, convinced Father O'Reilly that Famous would carry out its promises to properly market VIRGIN. Accordingly, on August 16, 1972 the contract known as the VIRGIN agreement was executed.

The agreement granted Famous exclusive rights to manufacture, distribute and promote VIRGIN throughout the world. Upon the insistence of Famous, the agreement also transferred half-ownership in the publishing rights to Famous. In return,

Famous was obligated to appoint at least one person to oversee the nationwide promotion of VIRGIN on a full-time basis, to expend at least fifty thousand (\$50,000) dollars on nationwide promotion during the first year of the agreement, and to release and properly promote during the first year at least four single recordings from the double album VIRGIN, the selection of which were to be approved by plaintiff.

VIRGIN was premiered in October, 1972 by a full-length live performance of the work at Lincoln Center in New York City. With certain exceptions, such as the review set forth at page twelve of Famous' brief, the performance was well received. After the performance, the full-scale VIRGIN promotional efforts were slated to commence. The spearhead of these efforts was to be the nationwide promotion of a "single" recording from the album. As with SUPERSTAR and TOMMY, the prior "concept" albums promoted by Mr. Martell, it was contemplated that the successful promotion of a "single" would in turn "break" the entire album. Thus, proper promotion of the "singles" was crucial to the success of the VIRGIN album. From the beginning this marketing plan was accepted by all concerned.

Unfortunately, the promotion efforts of Famous fell far short of the intended goals. The first single, "Got To Know," was released in early November, 1972, was declared by Famous to be "dead" less than three weeks later and would, therefore, no longer be promoted. Father O'Reilly protested

that the records were still going out to distributors at the time. How, therefore, could "Got To Know" be dead? The protests were ignored, and Famous proceeded to release a second single entitled, "Kyrie," which Famous had always thought should have been released before "Got To Know." Inexplicably, Famous chose to promote "Kyrie" in one city, Minneapolis, Minnesota, rather than nationwide, as it was obligated to do. Once again, Famous had botched the promotion effort, and VIRGIN was languishing as a result.

Therefore, when the next single, "Together (Body and Soulin')," was to be released in the spring of 1973, the Mission wanted assurances that it would be properly promoted. Mr. Martel suggested that the priests of the Mission assist in the promotion effort, which they agreed to do, provided that they were reimbursed for the expenses which they incurred. Mr. Martell readily agreed, but Famous subsequently failed to honor its promise to do so. The Mission nevertheless worked long and hard on promoting "Together (Body and Soulin')," and the song reached number 26 on the nationwide "Easy Listening" chart of Billboard, the chief trade magazine in the industry. As testified to by Mr. Martell, this achievement was due largely to the efforts of the Mission. Unfortunately, the promotion and distribution efforts of Famous were completely inadequate, and the overall effort suffered accordingly.

Frustrated but undaunted, the Mission selected a

fourth single recording, "Fear No Evil," and Mr. Martell assured Mission that this time Famous' promotion efforts would bear fruit. Once again, Mission began promoting the record nationwide by sending its priests throughout the country at its own expense, with a promise of reimbursement from Famous. On the other hand, Famous failed to match even its prior efforts, inept as they were, because in the midst of the promotion effort a budget reduction seriously cut back an already inadequate promotion force, rendering it virtually impotent.

Despite this, the efforts of the Mission were bearing fruit. Fifty thousand copies of "Fear No Evil" had been sold, the song was steadily climbing the chart of Billboard and was gaining national recognition, when without warning defendant G+W wrongfully directed defendant Famous to sell the Record Division of its business to ABC in utter disregard of a non-assignability provision in the VIRGIN agreement.

Father O'Reilly immediately met with Mr. Martell to ascertain how, in light of the sale, Famous intended to market the recordings. Mr. Martell replied that Famous had nothing further to do with the recordings and told Father O'Reilly to deal with ABC in the future. When Father O'Reilly contacted ABC, he was emphatically informed that ABC would have nothing to do with the marketing of the recordings, including "Fear No Evil." Worse yet, the wrongful sale resulted in the abrupt withdrawal of all recordings of "Fear No Evil" from the

marketplace, thereby short-circuiting its steady advance up the charts. Nevertheless, despite the fact that copies of the recording were no longer available to the record-buying public, "Fear No Evil" still climbed the chart for several weeks after it was wrongfully withdrawn, thereby attesting to its inherent appeal.

However, the damage had been done. Had the accelerating success of the single not been sabotaged, "Fear No Evil" would have "broken" the entire VIRGIN album. As this occurred, a lucrative nationwide concert tour would be arranged, resulting in the receipt of significant revenue by plaintiff.

3. The Crunch Agreement

Early in 1973, Famous wanted to ensure that it would have the benefit of albums composed and performed by the VIRGIN singing group, but did not have the funds to directly underwrite the cost of producing the albums. Accordingly, Tony Martell approached Father O'Reilly and suggested that Mission set up an independent record label to produce records, and Famous would distribute them throughout the United States. When told that Mission did not have the funds for such an undertaking, Mr. Martell explained that the recording costs could be covered by granting distribution licenses to foreign record companies and receiving guaranteed advance payments against royalties to be earned. It was on this basis that Famous and Mission

entered into the "Crunch" (record label) agreement, under which Famous was appointed the exclusive United States distributor of all Crunch product.

Essentially, the Crunch agreement called for plaintiff to produce and defendant to exclusively distribute ten long-playing albums and fifteen original singles per year. Based upon this agreement, Mission entered into foreign licensing agreements in Canada and England whereby it undertook to provide ten albums and fifteen singles each year (which would, of course, be the same recordings which were delivered to Famous under the Crunch agreement). As was clearly understood by Famous, the rights of foreign licensees to receive and distribute the Crunch product was dependent upon Famous' prior release and distribution of such product in the United States.

Mission began producing albums and singles, all of which were accepted by Famous. However, defendant repeatedly failed to release and distribute the recordings in a timely fashion due to internal delays in production, artwork and so forth. Moreover, when the afore-mentioned budget cutback occurred in early 1974, Mr. Martell told Father O'Reilly to curtail production of albums and singles because Famous was unable to distribute them. Father O'Reilly vigorously protested, reminding Mr. Martell that Mission had obligations to foreign licensees, but to no avail. As a result, when Mission was unable to deliver sufficient product to these licensees, they

refused to make further payments and threatened to sue Mission. Although Mission claimed damages at trial for resultant lost foreign royalties in excess of \$100,000.00, the issue did not go to the jury because plaintiff elected to proceed on an alternative theory of lost investment.

After Famous was sold without notice to ABC on July 31, 1974, no one, neither Famous nor ABC, did any further promotional work on the Crunch or VIRGIN recordings. Thus, as charged by Judge Owen as a matter of law, the jury determined that Famous remained liable for any unfulfilled obligations under Crunch, and awarded plaintiff damages of \$104,751 as compensation for the lost investment in Crunch.

4. Conclusion

Virtually from inception of the business relationship between the parties, defendant Famous failed to perform the VIRGIN and Crunch agreements. Famous failed to properly distribute and promote the VIRGIN recordings, to appoint a personal overseer and expend \$50,000.00 in nationwide promotion, to reimburse plaintiff for its promotion expenses, and so forth. Moreover, Famous slashed its budget, thereby curtailing both its promotion force and its ability to handle plaintiff's Crunch product. Despite this, Mission continued its attempts to salvage the business relationship with Famous in a positive way, as it made sense to do, rather than destroying the relationship by suing Famous, as it had the right to do.

Then, on July 31, 1974, the sale to ABC was made, thereby aborting all of plaintiff's efforts throughout the preceding two years. Once defendants had without warning wrongfully destroyed the business relationship with plaintiff, Mission was left with no choice but to commence this action.

ARGUMENT

I

THE JURY PROPERLY WEIGHED ALL OF THE CREDIBLE EVIDENCE PRESENTED WITH RESPECT TO BREACH OF THE VIRGIN AGREEMENT

Before setting aside a jury verdict because it is against the weight of the evidence, it must be found that the verdict is "at war" with all of the credible evidence or undisputed facts. O'Connor v. Pennsylvania R.R., 308 F.2d 911 (2d Cir. 1962). At page 18 of its brief, Famous attempts to limit the jury's consideration of whether the Virgin agreement was breached to paragraph 14 thereof, dealing with the so-called "personal overseer" and "\$50,000.00 promotion" questions. Moreover, Famous asserts that "both parties" have agreed that this is so. (Brief at 18). Simply stated, defendant is plainly in error.

First, paragraph 14 of the Virgin agreement is not even mentioned in the first, or for that matter, any question submitted to the jury. Second, Judge Owen clearly recognized that the jury was not limited to the provisions of paragraph 14 in deciding whether the promotion obligations of Famous under the Virgin agreement were breached, stating that the jury should also consider whether "Famous cut back its promotional staff at some point during this period," the period in question being the years 1973 and 1974. (A- ; T-2397). In addition, plaintiff strenuously contended during trial

that defendant breached the Virgin agreement by prematurely terminating promotion of the single recording, "Got To Know," within three weeks after it was released, and by promoting the single recording, "Kyrie," only in the Minneapolis, Minnesota area, rather than nationwide as was its obligation under the agreement.

It is therefore evident that the Virgin verdict should be affirmed under the authority of the cases cited in defendant's own brief! Specifically, Simblest v. Maynard, 427 F.2d 1 (2d Cir. 1970), cited at pages 18 and 23 of defendant's brief, sets forth the standard that a plea to overturn the verdict "should not be granted unless it is clear that there can be but one conclusion as to the verdict that reasonable men could have reached." Since defendant completely ignored the fact that the jury also considered the issues of the cut-back in promotion staff and whether the individual recordings were promoted nationwide for a sufficient period of time, the verdict should be affirmed on this basis alone.

Moreover, the "\$50,000.00 promotion" and "personal overseer" issues raised by defendant do not meet the test enunciated in O'Conner and Simblest, supra. In C. Connor Judge Kaufman noted that "the trial court must view the evidence and all inferences most favorably to the party against whom the motion is made." 308 F.2d at 914; accord, Simblest, supra.

From the trial testimony it is clear that Mr. Schlissel, rather than Mr. Martell, was defendant's primary witness with respect to the question of whether at least \$50,000.00 was spent on national promotion during the first year of the contract, since Mr. Schlissel testified on this matter alone. (T-2080, 2082-90). In responding to a question during direct examination, Mr. Schlissel stated that "approximately \$50,000 was spent on promotion." (T-2090, emphasis added). Moreover, in response to a question during cross-examination, Mr. Schlissel agreed that it is possible that less than \$50,000.00 was actually spent on promotion. (T-2092). Therefore, it is clear from the testimony of defendant's chief witness on this point that defendant failed to establish with assurance whether \$50,000.00 was spent on promotion, let alone whether it complied with paragraph 23(c) of the Virgin agreement which required it to set forth in writing to plaintiff the amount and nature of promotional expenditures made nationwide.

Defendant Famous also claims that the November 28, 1972 "waiver" letter (A-) relieves Famous of any liability under this provision of paragraph 14, and that this question therefore should not have been presented to the jury. The pertinent paragraph of the letter states:

"Famous Music shall be relieved of its obligation to spend a minimum of 50,000 dollars in the

promotion of Virgin record sales,
if, as, and when in the sole
opinion of Famous Music Corpora-
tion, promotion shall cease to
be effective and profitable."
(emphasis added).

Father O'Reilly testified that Famous Music not only failed to exercise the afore-mentioned option, but thereafter enthusiastically agreed to release additional VIRGIN recordings, namely, "Together (Body and Soulin')" and "Fear No Evil" during 1973 and 1974. (T-953).

It is therefore evident that Famous chose not to exercise its option under this letter, and that the exhibit was properly presented to the jury for consideration, in that the facts concerning the expenditure of \$50,000.00 were clearly in dispute.

Similarly, defendant claims the evidence is "uncontradicted" that a "personal overseer" was appointed by defendant, that it was Mr. Martell, and if not he, then it was certainly Mr. Gordon, or perhaps both! (Brief at 22-23). Although counsel for defendant repeatedly assured Judge Owen and the jury during trial that Mr. Martell himself was the personal overseer, when Mr. Martell took the stand he testified that Mr. Gordon, director of promotion for Famous, was the personal overseer (T-2027), but that he had not communicated this to Father O'Reilly in accordance with paragraph 14. (T-2028, 2031). It is therefore apparent

why counsel for defendant has been playing "musical chairs" with the personal overseer.

In addition, it is beyond doubt that the jury could have found from the credible evidence that defendant also failed to comply with paragraph 14 of the Virgin agreement, which obligated it to appoint a personal overseer to oversee the nationwide promotion of the sale of records thereunder. It should be noted that Mr. Gordon made the decision to promote the recording "Kyrie" only in the Minneapolis, Minnesota area rather than nationally. Therefore, even if Mr. Gordon were the personal overseer, as claimed, the jury could have found that he utterly failed to perform his duties in accordance with paragraph 14 of the agreement. Thus, it is apparent that defendant has failed to offer the "undisputed" or "uncontradicted" factual evidence required by O'Connor, supra, indicating that it complied with paragraphs 14 and 23(c) of the Virgin agreement.

From the foregoing, it is evident that defendant has clearly failed to sustain its heavy burden of showing that "there can be but one conclusion as to the verdict that reasonable men could reach" in this case. Simblest, supra, 427 F.2d at 4. The verdict should therefore be affirmed.

II

THE TRIAL COURT PROPERLY DETERMINED
EITHER THAT NOTICE TO FAMOUS REGARD-
ING BREACH WAS FRUITLESS OR THAT
NOTICE ACTUALLY GIVEN BY PLAINTIFF
TO FAMOUS WAS SUFFICIENT

A. Introduction

At the outset, it is important to correct an assertion which defendant has repeatedly but erroneously made throughout its brief. Defendant claims that the jury determined that Famous did not breach the Crunch agreement. This is simply not so! The jury found in accordance with Judge Owen's instructions that there was a refusal by ABC to perform the Crunch contract and promote plaintiff's music after the assignment (Liability question 5, supra) and that Famous remained liable for any obligation that was not fulfilled by ABC. (A- ; T-2399). Clearly, therefore, the jury found a breach of Crunch for which Famous was liable.

B. None of the "Notice" Cases Cited by Defendant Famous Are Germane

Plaintiff agrees with defendant's contention that the notice provision of paragraph 15 of the Crunch agreement is enforceable under New York law. Likewise, the parties agree that notice was in fact given, but differ as to its effect. None of the cases cited by counsel for defendant are germane, however, since each of them deals with a situation

where notice was never given per se, or where the notice given was technically defective, not with a situation where the parties disagree whether the contract was in fact breached.

For example, in Young v. Western Union Telegraph Co., 65 N.Y. 163 (1875), the claimant failed to comply with the notice provision because he attempted to give written notice to a clerk, who had no authority to receive it, instead of serving it upon an authorized agent of defendant. When plaintiff attempted to again present notice after the sixty day period had expired, the Court of Appeals ruled that he had failed to satisfy the notice provision.

Likewise, in Seeley v. Osborne, 161 App. Div. 844, 147 N.Y.S. 116 (1st Dep't 1914), the written notice clearly was not sent.

In the case at bar, defendant concedes that plaintiff completely complied with the notice provisions as such. Therefore, none of the "notice" cases cited by defendant are pertinent. As a matter of fact, if the plaintiff in Young, supra, had presented written notice to an authorized agent of defendant within the sixty day period, the situation would have approximated what took place in the case at bar.

C. Where Performance Has Effectively
Been Rendered Impossible, A Con-
tractual Notice Provision No Longer
Has a Purpose

Assuming arguendo that plaintiff's notice was not completely effective, New York courts have repeatedly stated that where notice would be fruitless, it will not be required, even if a contract provides for it. Where performance has been made impossible, the law does not require the useless formality of a demand. Roberts v. New York Life Ins. Co., 195 App. Div. 97, 101, 186 N.Y.S. 422, 425 (1st Dep't 1921) (declaring principle to be a well settled rule), aff'd, 233 N.Y. 639, 135 N.E. 951 (1922). When one party is incapable of performing its obligations, due to its own actions, the other party has no obligation to formally put the party in default. Drake v. Hodgson, 192 App. Div. 676, 183 N.Y.S. 486 (1st Dep't 1920).

The purpose of the notice provision in the Crunch Agreement was to afford the party against whom breach was alleged the opportunity to cure the breach within thirty days if it so desired, and if able to do so. No other purpose is suggested in the cases cited by defendant, nor can any other purpose logically be suggested.

In the instant action, defendants G+W and Paramount directed defendant Famous to transfer the assets of its recording division, a multi-million dollar a year operation, to ABC on or about July 31, 1974. Does Famous now argue that

had it received "proper" notice on August 21, 1974 it would have rescinded the ABC agreement in order to cure the breach complained of? Obviously, even if defendant were of the opinion that the sale constituted a breach of the Crunch agreement, the tremendous amount of effort required to rescind the sale would have rendered such a business decision completely impractical, and therefore out of the question.

Thus, even assuming that notice given by plaintiff was not completely effective, it is clear that the law of New York does not require such notice where it would have been fruitless to provide it, as in the present case.*

D. The Crunch Agreement Is Not Assignable

Defendant has argued that plaintiff gave defendant notice only of a breach by assignment. Plaintiff rejects this obvious attempt to narrow its position and respectfully refers the Court to the registered letter of August 21, 1974

*In addition, the jury found that defendant's breach of the Crunch agreement occurred after the sale by Famous, in that ABC refused to promote the Crunch recordings, and that Famous therefore remained liable for any obligations thereunder. (A- ; T-2399). Therefore, Famous cannot claim that it has been harmed by the fact that it did not receive proper "notice" in accordance with paragraph 15 of the agreement as to those breaches which allegedly took place before the sale of Famous to ABC, since the jury found that Famous did not breach the Crunch agreement prior to the ABC sale. By its sale to ABC, Famous consciously chose to strip itself of any capability of performing the Crunch agreement in the future. Accordingly, when ABC refused to perform, Famous had made certain that it could not perform its obligations, and therefore clearly brought itself within the rule of Roberts and Drake, supra.

for its full meaning and effect. (A-).

Defendant has cited several cases in support of its argument that absent express prohibitions, contracts are freely assignable. In each of these cases, however, a money debt was assigned. Thus, the only rights and obligations involved related to the payment and receipt of money. Moreover, Madison Pictures v. Chesapeake Indus., Inc., 147 N.Y.S.2d 50 (Sup. Ct. 1955), cited in defendant's brief, dealt with a contract which expressly permitted assignment.

None of these cases are in any way similar to the relationship between the parties to the Crunch agreement. In the present case, Mission permitted Famous to become the exclusive manufacturer and distributor of products produced and owned by plaintiff. Unlike the cases cited by Famous, both parties herein were performing for one another on an exclusive basis duties which were in the nature of personal services.

It is impossible to imagine a situation in which Famous could assign its right to receive product from plaintiff without simultaneously delegating its duties to manufacture and distribute said product. Thus, a careful distinction must be made between rights and duties under a contract. Madison Pictures, supra, 147 N.Y.S.2d at 57. "Rights arising out of a contract cannot be transferred if they are coupled

with liabilities or if they involve a relationship of personal credit and confidence." Paige v. Faure, 229 N.Y. 114, 118, 127 N.E. 898 (1920). Courts have stated that a bilateral contract involving services, confidence or reliance upon the character or credit of one of the parties cannot be assigned by either party without the consent of the other. Paige v. Faure, supra; New York Bank Note Co. v. Hamilton Bank Note Engraving & Printing Co., 180 N.Y. 280, 292-93, 73 N.E. 48 (1905); Heatmor, Inc. v. Bang Oil Co., 256 App. Div. 997, 10 N.Y.S.2d 736 (2d Dep't 1939).

Plaintiff submits that, contrary to the erroneous assertion of Famous in its brief that the trial court determined that the Crunch agreement was assignable, the lower court did not determine this question; and that the jury verdict was properly reached without determining this question. If this Court believes that it is necessary to resolve the issue on appeal, plaintiff respectfully submits that the Crunch agreement was one involving personal and exclusive services and was, therefore, non-assignable as a matter of law without the consent of both parties.

E. Even If The Crunch Agreement Were Assignable, The Sale Of Famous' Recording Division Assets Resulted In A Breach For Which Famous Remains Liable

Even if this Court were to find that the Crunch

agreement was assignable by Famous without the consent of plaintiff, the agreement was nevertheless breached when Famous actually attempted to assign its duties and obligations thereunder. As the testimony indicated, after the sale and prior to August 21, 1974, ABC refused to abide by the attempted "assignment" of the Crunch agreement; ABC informed Mission that it would not honor the agreement. (A- ; T-245).

It is settled law that even if a party may assign its rights in a contract, the party will remain liable if performance by the assignee of the original contract duties is defective or totally lacking. Davidson v. Madison Corp., 257 N.Y. 120, 177 N.E. 393 (1931). Therefore, when the assignee (ABC) refused to honor the Crunch agreement, Famous remained obligated to do so, as found by Judge Owen. (A- ; T-2399). Famous was both unwilling and unable to resume its obligations, since it had sold all of its Recording Division assets to ABC and was not prepared to rescind the sale. Consequently, after the sale neither Famous nor its assignee performed Famous' obligation under the Crunch agreement. This total failure was a breach for which Famous is liable.

Moreover, even though Famous' duties may have been delegable, if an assignor notifies the obligor that it must thereafter look solely to the assignee for performance, this constitutes a repudiation of the contract and the obligor no longer has any obligation to accept performance from the

assignee. The obligor is excused from any further duty of performance and may sue the assignor for total breach. N.Y. Contracts Law § 1114, citing Paige v. Faure, supra.

In the instant case, it is clear that Famous, by its president Tony Martell, did much more than merely attempt to delegate its duties to ABC. Father O'Reilly testified that Mr. Martell told him not to speak about the sale, but to "go see ABC." (A- ; T-231). Mr. Martell confirmed this when he testified he told Father O'Reilly that "it is up to ABC" (A- ; T-2047) and "I suggest you contact Jay Lasker [president of ABC] at ABC in Los Angeles right away and see what is what." (A- ; T-2048). Accordingly, plaintiff submits that under the Paige rule enunciated supra, Famous repudiated its obligations as assignor of the Crunch agreement, and that any notice which may otherwise have been required under paragraph 15 was thereby rendered unnecessary.

Accordingly, defendant's contentions regarding improper notice are without merit and the Crunch portion of the verdict may not be set aside on that ground.

III

TESTIMONY CONCERNING ABC'S
NON-ASSUMPTION OF ANY DUTIES
UNDER THE CRUNCH AGREEMENT
WAS PROPERLY ADMITTED AND
WAS SUFFICIENT TO SUPPORT
THE VERDICT

A. Testimony of Various Witnesses
Regarding ABC's Non-Assumption
of Duties Under Crunch

In its brief on appeal, defendant makes the unsupported assertion that the only testimony in the record concerning ABC's activities relative to the Crunch agreement are the conversations between Father O'Reilly of plaintiff and Mr. Korobkin of ABC, which are claimed by Famous to be inadmissible hearsay. Famous' assertions erroneously ignore the testimony of Mr. Martell and Fred Ruppert of Famous with respect to this matter.

Mr. Ruppert, who was a witness for defendant Famous, testified that to his knowledge no promotional activity took place with respect to plaintiff's recordings after the ABC sale. (A- ; T-2252).

Mr. Martell testified that he informed Father

O'Reilly after the ABC sale that Famous had nothing more to do with plaintiff's recordings and that he would have to go see ABC in order to learn what was to be done, if anything, with respect to the promotion thereof (A- ; T-2047, 2048). Mr. Martell further testified that he knew that ABC was getting rid of Famous record merchandise (A- ; T-2052).

Thus, without reference to the conversations between Father O'Reilly and Mr. Korobkin of ABC, we learn from the testimony that everyone was being sent to ABC to learn their fate, that ABC was not promoting plaintiff's recordings, and that ABC was getting rid of Famous record merchandise. Plaintiff submits that even without the Father O'Reilly-Mr. Korobkin testimony, the foregoing testimony provides sufficient basis for the jury to determine that ABC refused to promote plaintiff's music after the assignment (Liability Question 5, supra).

**B. Testimony Concerning Statements of
Mr. Korobkin Is Admissible and Relevant
to the Issue of ABC's Non-Assumption of
Duties Under the Crunch Agreement**

Defendant Famous has argued in its brief on appeal that no admissible evidence was introduced at trial

to support a verdict against it for breach of the Crunch agreement. Plaintiff has herein presented several examples from the trial transcript of clearly admissible testimony on this issue from which the jury reasonably could have reached its verdict. Plaintiff will now reply to defendant's tortured argument that testimony involving out-of-court statements by Len Korobkin of ABC was not probative of the issue of Famous' liability for ABC's inaction with regard to the Crunch agreement.

At this point, plaintiff must emphasize that Judge Owen's instruction on this issue and the jury's verdict did not require a finding that ABC "breached" the Crunch agreement. Without conceding that ABC had any rights or obligations under the Crunch agreement, plaintiff introduced evidence at trial clearly tending to indicate that ABC did not assume any obligations or take ~~any~~ action with regard to Crunch, except to withdraw Crunch product from the marketplace, thereby rendering performance by anyone impossible. As indicated at page above, Martell's statement to Father O'Reilly that plaintiff would have to look to ABC for performance was in itself a repudiation of the Crunch agreement; that statement, coupled with a failure by anyone, including ABC, to perform the

Crunch agreement, is more than sufficient evidence to support the jury's verdict. The jury did not have to find a breach by ABC, since the result can reasonably be reached even if ABC assumed no rights or obligations under the Crunch agreement, as plaintiff proved at trial and maintains herein.

Defendant Famous nevertheless argues that the only evidence of a "breach" by ABC was contained in testimony by Father O'Reilly about his conversations with Mr. Korobkin shortly after the sale. Father O'Reilly testified that Mr. Korobkin stated that ABC wanted no part of the Crunch Agreement. (T-243 and 351 .) Famous' argument is based on two narrow contentions: first, the testimony on this question was admitted only for the purpose of showing plaintiff's attempts at mitigating damages and so was not probative of any "breach" by ABC; second, the testimony is inadmissible under the Federal Rules of Evidence. Plaintiff submits that a more balanced analysis of the actual testimony and the rules of evidence than that set forth by defendant Famous will demonstrate that Famous' contentions are without merit.

Significantly, in its brief, Famous erroneously

stated that the purpose for which the testimony concerning Mr. Korbkin was admitted by the Court was to show plaintiff's mitigation of damages. In asking questions of Father O'Reilly about the Virgin Contract, Counsel for plaintiff initially indicated that such questions and testimony were for the purpose of proving plaintiff's additional expenses; but, almost immediately thereafter he broadened the scope of the offer of evidence to include proof that ABC did not choose to honor the Virgin and Crunch contracts. The Court expressly admitted the testimony for the latter purpose, and Famous did not object. Excerpts from the transcript clearly demonstrate that this was so. Thus, upon a request by the Court for an offer of proof on this issue, Counsel O'Reilly stated at the side bar:

"As you recall one of the arguments we are making is that Famous had no right to assign these contracts anyway but even if they did, ABC did not pick them up and ABC did not choose to honor the contracts". (T-235; emphasis added)

In response to arguments by counsel for G+W and Paramount [but not for Famous] that the contract of sale between ABC and Famous provided that ABC would in fact honor the contracts, and that plaintiff should have sued ABC for breach, the Court said:

"The claim is that passing the question of whether you had a right to assign the contract in the first place, it was a condition of the assignment that the assignee agreed to be bound by the obligations of the agreement. He is going to put in proof that the assignee rejected the agreement." -236; emphasis added)

On that basis, Father O'Reilly of plaintiff testified, inter alia, that he telephoned the president of ABC and was transferred to a vice-president, who stated that he was unable to speak with Father O'Reilly. Father O'Reilly then met with Mr. Korobkin, an attorney for ABC, who stated that ABC did not want any part of Crunch.

At this point, the Court struck a portion of Father O'Reilly's testimony dealing with certain comments of Mr. Korbkin, after which counsel for all parties had a conference with the Court at the side bar. Immediately thereafter, Judge Owen asked Father O'Reilly in open court:

"THE COURT: It is established that ABC said they weren't going to have any relationship with your company

THE WITNESS: Yes.

THE COURT: Right?

THE WITNESS: Yes** (T-245; emphasis added)

Significantly, Famous did not object to the admission of the testimony for this purpose, though it came immediately after an off-the-record conference at the side bar. As stated in Federal Rule of Evidence 103(a)(1):

"Error may not be predicated upon a rule which admits . . . evidence unless a substantial right of a party is affected, and . . . a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context . . ."

No objection was made, nor was a specific ground of objection stated or apparent.** Therefore, since the testimony was admissible, as indicated below, or at the very least, the inadmissibility of such evidence was not so patent that this Court may take notice of a "plain error" to which no objection was made, see Federal Rules of Evidence 103(d), defendant cannot now be heard to challenge the scope of the testimony on appeal.

* After stating that testimony on this question was concluded, the Court said to the jury, "Ladies and Gentlemen, it is only the fact that is important. The expressions of comment of somebody at ABC are not for your consideration." (T-245)

** Nor did Famous raise this point in its motion for a directed verdict at the conclusion of the evidence. The first time Famous raised the argument on the inadmissibility of this testimony was in its Motion for Judgment Not Withstanding the Verdict. Under Federal Rule of Civil Procedure (50) (b), a party may not raise in a motion for Judgment NOV, or on appeal any questions not raised in a motion for a directed verdict. (See Moore, Federal Practice, paragraph 50.08)

The testimony described above dealt primarily with ABC's non-assumption of the Virgin contract, though it referred to both the Virgin and Crunch contracts (A- ; T-235). Counsel for plaintiff also questioned Father O'Reilly specifically about ABC's refusal to deal with the Crunch agreement. Counsel for plaintiff stated, in response to an objection by G + W and Paramount, [but not Famous], that this testimony was being introduced in mitigation of damages. (A- ; T-349). The Court, however, recognized the broader purpose of the testimony and admitted it without objection by Famous:

**** I will permit this in evidence because Martell told him (Father O'Reilly) to talk to these people, and find out what was happening with his contract" (T-349; emphasis added).

Father O'Reilly then testified that Mr. Korobkin told him all Famous product was being taken off the market. After a colloquy among counsel for Famous, the Court, and Father O'Reilly, indicating that this was not the same conversation as that already testified to, Father O'Reilly stated that Mr. Korbkin said ABC would not deal with Crunch Records (T-351). Once again, Famous made no objection to this testimony.

Famous' position on this matter crystallized during the Court's discussion with counsel on the question of jury instructions regarding the amount of damages.* Mr. Lawless, counsel for Famous, questioned the manner in which the Court would charge the jury with regard to damages under the Crunch agreement. The Court stated:

THE COURT: Mr. Lawless has a good point by finding that they[the jury] didn't find you [Famous] failed to promote. They find that you dropped the ball by putting them [Mission] in the hands of ABC who didn't promote."

MR. LAWLESS: That is right "

(A- ;T-2441; emphasis added)

It is clear, therefore, that the Court expressly permitted the introduction of this testimony for the purpose of determining what, if anything, ABC planned to do or was doing with the contracts. Famous was fully aware

* The Court first charged the jury on the liability question. After the jury found Famous liable on six of seven issues, the Court prepared to charge them on the question of determining damages, and invited counsels' suggestions and advice.

of the scope of admission yet did not object or specify grounds for objection, and therefore cannot now be heard to complain.

Moreover, the testimony about Mr. Korobkin's statements to Father O'Reilly is in any event admissible under the Federal Rules of Evidence. Defendant Famous makes a rather unique argument by asserting that under the circumstances the only possible exception to the hearsay rule which can be applicable is found in Rule 804(b), which permits admission of a declaration against interest by a non-witness who is unavailable to testify. Plaintiff emphatically rejects this obvious attempt to put a square peg in a round hole.

Once again, Famous made no objections to admission of the statements; nor were any specific grounds for objection stated or apparent. The Court, therefore, did not have the benefit of defendant's belated exposition of Rule 804(b).^{*} Thus neither the Court nor plaintiff had the opportunity to test the rationale for admission in a provision of the

^{*} Famous raised this issue for the first time on its motion for judgment N.O.V.; for this reason, its challenge on appeal must be dismissed. See note on page 35 supra.

Federal Rules more to the point than Rule 804, as herein suggested by plaintiff. Defendant cannot now be heard to demand a reversal on the law when through its own inaction it failed to raise in timely fashion this issue at trial which could have enabled the Court to respond with a considered finding susceptible of review by this Court.

Defendant inexplicably failed to note in its appeal brief the existence of Rule 803, which provides, inter alia, that testimony will not be excluded by the hearsay rule "even though declarant is available as a witness", where the testimony is a "statement of the declarant's then existing state of mind . . . (such as intent, plan, motion, design . . .)"Rule 803(3). As Judge Weinstein notes in Evidence, paragraph 803(3) [04], "State of Mind to Show Subsequent Events", testimony about state of mind may be admissible to prove the existence of that state, or to tend to indicate that a subsequent act was done or not done in accordance with that state of mind. This latter purpose is evaluated in terms of relevance rather than hearsay. In this case, whether ABC intended to assume duties under the Crunch agreement had direct impact on the liability of Famous for breach of the Crunch contract, and the probative value

of the testimony is clear. The weight of such testimony is for jury determination. Judge Owen properly limited the nature of this testimony when admitting it into evidence: "[I]t is only the fact that is important. The expressions of comment are not for your consideration" (T-245).

This Circuit has supported the use of this exception to the hearsay rule. Thus, for example, when a plaintiff testifies that a third person stated his willingness to take on a certain obligation and such willingness tended to indicate that plaintiff could have acted as he claimed in the complaint, the statement should be admitted, under the "state of mind" exception to the hearsay rule, to prove the truth of what was said and to prove circumstantially that the declarant would act in a manner consistent with his intention. Scholle v. Cuban Venezuelan Oil Voting Trust, 285 F.2d 318,321 (2d Cir.1960); see United States v. Annunziato, 293 F.2d 373,377 (2d Cir.1961); Oneonta Dress Co. v. NLRB, 333 F.2d 1,4 (2d Cir. 1964).

Accordingly, Famous' argument that the verdict concerning breach of the Crunch agreement is not supported by any admissible evidence should be rejected in all respects, and the verdict against defendant should be affirmed.

IV

PLAINTIFF WAS ENTITLED TO NOTIFY
ALL PARTIES THERETO THAT THE SALE
OF FAMOUS MATERIALLY BREACHED
PLAINTIFF'S CONTRACTS

- A. Famous repudiated the Crunch Agreement,
and plaintiff could therefore send a
notice of breach

Famous contends that Mission's "repudiation of the assignment of the Crunch agreement estopped plaintiff from suing for any breach allegedly committed by ABC. Plaintiff considers this contention to be rather incredible! In order to make it crystal clear, plaintiff again stresses that it has never alleged that ABC has breached any contractual obligations to it; rather, Mission has consistently claimed that whether or not the Crunch agreement is assignable, no one, neither Famous nor ABC, ever promoted the Virgin or Crunch recordings after the July 31, 1974 sale of Famous to ABC, and that Famous therefore remained liable to perform under both the Crunch and Virgin agreements.

As set forth above, Famous, not Mission, repudiated the Crunch agreement. Tony Martell, the president of Famous, clearly told Father O'Reilly on or about

July 31, 1974 that Famous would have nothing more to do with Virgin and Crunch, and to "go see ABC". (A- ; T-231, T-2047, T-2048). This language is unarguably a repudiation of the contract, particularly in view of the undisputed fact that Famous had completely stripped itself of any ability to perform the Crunch agreement if ABC was either unwilling or unable to perform after the asserted assignment. If the assignor notifies the obligor that he must look solely to the assignee for performance, this constitutes a repudiation of the contract, and the obligor may sue the assignor for total breach. N.Y. Contracts Law, section 1114, citing Paige v. Faure, supra. Thus, if Mission had the right to sue for total breach, it was clearly entitled to send a notice of breach to the parties.

Unhappily, when Father O'Reilly did "go to see" ABC, he was informed in no uncertain terms that ABC would have nothing to do with either the Virgin or Crunch agreements. (A- ; T-236-245). Moreover, ABC even went so far, according to Mr. Martell, as to "get rid of--sell off [Famous] merchandise." (A- ; T-2052).

All of the foregoing occurred before Mission sent

the telegram of August 19, 1974 (A-) and the letter of August 21, 1974 (A-). Thus, it is clear from the very cases cited by Famous in its brief on appeal that defendant, not plaintiff, repudiated the Crunch agreement. Specifically, in Tradewell Foods Inc. v. N.Y. Credit Men's Adjustment Rent Bureau, 179 F. 2d 567 (2d Cir. 1950) this Court recognized that one who causes non-performance should not be allowed to profit from that non-performance. Can it reasonably be argued that Mission caused the non-performance set forth above by sending a notice of claim of breach after the acts in question occurred?

Moreover, it is elementary that the mere sending of a notice of alleged breach does not constitute a repudiation of the agreement, particularly when the paragraph referred to therein, namely paragraph 15, is a thirty day "cure of breach" provision. Furthermore, how can defendant consistently contend that the transmission of the letter and telegram constitutes a repudiation of the Crunch contract, while simultaneously asserting that its disavowal of any future obligations under the Crunch agreement after assignment to ABC is not a repudiation thereof?

B. Famous is precluded from
pleading estoppel

The trial transcript is completely devoid of any attempt by Famous to raise the defense of estoppel during trial. Instead, the argument is raised for the first time in Famous' motion for judgment n.o.v., rather than at the close of all the evidence during trial. At paragraph 50.08 of Moore, Federal Practice, it is stated:

"Motion for Directed Verdict as
a Prerequisite of Judgment N.O.V.

Thus, a motion for judgment n.o.v. may be entertained only if the movant has made a motion for a directed verdict at the close of all the evidence. Hence, a defendant who fails to move for a directed verdict at the close of all the evidence.....cannot present to the trial court a question as to the legal sufficiency of the evidence to support a verdict for his opponent by a motion for judgment n.o.v. or raise the question on appeal".

(footnotes omitted, cases cited,
emphasis added)

Defendant has previously cited Mosley v. Cia
Mar Andra S.A., 362 F.2d 118 (2d Cir. 1966) as support for its contention that a request for a directed verdict, even though couched in the most general of terms, preserves the right to make an n.o.v. motion. It is clear however, that

this holding is not on point in a case where this issue (i.e., estoppel) was never raised during trial. Thus, in Oliveras v. American Export Isbrandtsen Lines Inc., 431 F.2d 814, 816 (2d Cir. 1970) the Court cited with approval a statement of Professor Moore:

"This is to avoid making a trap of the latter motion. At the time that a motion for directed verdict is permitted, it remains possible for party against whom the motion is directed to cure the defects in proof that might otherwise preclude him from taking the case to the jury. A motion for judgment n.o.v. without prior notice of alleged deficiencies of proof, comes too late for the possibility of cure except by way of a completely new trial. The requirement of the motion for directed verdict is thus in keeping with the spirit of the rules to avoid tactical victories at the expense of substantive interests."5 Moore, Federal Practice, Section 50.08 at 2359.

This is precisely what Famous is attempting to accomplish by asking this Court to do the job that defendant should have done at trial. Famous should therefore be precluded from pleading estoppel in order to set aside the Crunch verdict.

V

FAMOUS HAS NOT DEMONSTRATED
THAT THERE HAS BEEN A FAILURE
OF PROOF AS TO UNALLOCATED
DAMAGES

It has been clearly established that defendant is not entitled to a reversal on any issues raised in its brief on appeal. It follows therefore that defendant is also not entitled to a reversal on its fifth argument (Brief at 45), since counsel for defendant has conceded that if it does not prevail as to the Crunch or Virgin verdicts, it may not prevail on this issue. Therefore, the verdict of the jury awarding \$21,000 in "unallocated" damages should stand.

CONCLUSION

In view of the foregoing, plaintiff respectfully submits that defendant's appeal should be dismissed and the verdict of the jury on the questions of liability and damages representing plaintiff's lost investment in the contracts should be affirmed in all respects.

BRIEF OF PLAINTIFF ON CROSS-APPEAL

STATEMENT OF ISSUE
PRESENTED FOR REVIEW

This is a cross-appeal by plaintiff Contemporary Mission, Inc. (hereinafter, "Mission") from a ruling rendered by the Hon. Richard Owen during trial of the above-identified action excluding any testimony concerning prospective damages suffered by plaintiff resulting from the sale of the Record Division of Famous Music Corporation (hereinafter, "Famous") to ABC Records, Inc. (hereinafter, "ABC").

ISSUE

Whether the Court Below
Improperly Excluded Testimony
Concerning Prospective Damages

STATEMENT OF CASE

Plaintiff hereby incorporates by reference herein the Statement of the Case commencing at page 3 supra, and this Court is respectfully referred thereto for a complete

narration of the nature of this case, the course of proceedings, and statement of facts pertinent to this cross-appeal.

The sale of Famous to ABC wreaked special havoc on the recording "Fear No Evil", which at the time of the sale was steadily rising on the "Hot Soul Singles" chart of Billboard magazine, the principal trade magazine of the record industry. The climb of "Fear No Evil" up the chart meant that it was receiving progressively greater amounts of radio airplay and was generating progressively larger numbers of sales. At the time of the sale, "Fear No Evil" had already sold some 50,000 copies. Accordingly, when as a result of the sale of Famous to ABC, the recordings of "Fear No Evil" were withdrawn from the market place, the gathering momentum which precedes a "hit" record was dissipated and untold record sales were lost. As explained previously, a "concept" album such as Virgin is normally "broken" by first releasing a "hit" single. "Fear No Evil" was destined to be a "hit", but for the actions of defendant in selling without warning and without making provisions for an orderly transfer of recordings to ABC.

During trial, plaintiff attempted to introduce a comprehensive statistical analysis, together with expert testimony, in order to show how much further up the chart "Fear No Evil" could reasonably have been expected to climb, after which an expert would give testimony regarding the number of recordings which would reasonably be expected to be sold.

The trial court excluded any such testimony on the ground that it would force the jury to engage in "the highest form of speculation" regarding future damages (A- ; T-1829). Plaintiff appeals from this ruling.

ARGUMENT

THE COURT BELOW IMPROPERLY EXCLUDED TESTIMONY CON- CERNING PROSPECTIVE DAMAGES

A. The Law

There are any number of cases which have held that damages must not be "speculative" or "remote". Broadway Photoplay Co. v. World Film Corp. 225, N.Y. 104, 121 N.E. 756 (1919). "It is a well established rule of the common law that the damages to be recovered for a breach of contract must be shown with certainty, and not left to speculation...." Griffin v. Colver 16 N.Y. 489, 491 (1858)

However, the amount of damages need not be proven with mathematical precision. Dunkel v. MacDonald 70 N.Y.S. 2d 653, aff'd 298 N.Y. 586, 81 N.E. 2d 373 (1948). "Moreover, where it is certain that damages have been caused by a wrong, and the only uncertainty is as to the amount of damage, there can be no good reason for refusing on account of such uncertainty any damage for the wrong." Dunkel supra. (citing 101 N.Y. 205; 254 App. Div. 904). Furthermore, a wrongdoer may not escape liability simply because there are not available the ordinary standards for proving damages. Wakeman v. Wheeler & Wilson Mfg., 101 N.Y. 205, 209, 210, 4 N.E. 264 (1186). The law will resort to some practical means that will be just to the parties. Brady v. Erlanger, 188 A.D. 728, 733, aff'd 231 N.Y. 563, 269, A.D. 321, 328; 8 N.Y.S. 702, 704-5 (1921).

Thus, the prior rule of "certainty" has been supplanted by a case-by-case factual determination of prospective damages. Again and again, courts have held that a wrongdoer who caused the "uncertainty" is not entitled to complain. In Bigelow v. RKO Radio Pictures, 327 U.S. 251, it was stated:

The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created That principle is an ancient one. The constant tendency of the courts is to find some way in which damages can be awarded where a wrong has been done. Difficulty of ascertainment is no longer confused with right of recovery for a proven invasion of the plaintiff's rights.

In deciding questions of certainty of proof, there is a clearly discernible tendency to treat the problems more and more individually and pragmatically, and if plaintiff has furnished the most satisfactory data that the particular situation admits of, this suffices. Story Parchment Co v. Paterson Parchment Paper Co. 282 U.S. 555, 564, 51 S Ct. 248, 75 L.Ed. 544 (1931).

B. The Facts

The issue of prospective damages deals only with the Virgin agreement and not with Crunch. Judge Owen charged the jury as a matter of law that the attempted assignment of the Virgin agreement was a breach thereof. In addition, the jury found that the breaches of Virgin

agreement damaged plaintiff (Liability questions 2 and 3 supra). Therefore, applying the law set forth above to the findings, it is evident that actual damages were caused by the wrong (i.e. the breach), and the wrongdoer may not escape liability simply because there are not available the ordinary standards for proving damages. (Wakeman supra)

Given these circumstances, plaintiff had searched long and hard before trial in order to be able to furnish the most satisfactory data the particular situation admits of. (Story Parchment supra). Since "Fear No Evil" had reached a high point of position #61 on the Billboard chart in August, 1974, plaintiff decided to compile a comprehensive statistical analysis of every song which reached position #61 during the entire year of 1974, noting the highest position reached by each song in order to determine the overall average high position of all songs on the "Hot Soul 100" chart which fit this criterion during the appropriate time period. In this manner, plaintiff would be able to objectively anticipate with reasonable assurance the average high position which "Fear No Evil" could be expected to achieve had it not been withdrawn from the market.

During 1974 a total of 324 songs made position #61 or better on the chart. Of these, some reached position #1, while others (including, of course, "Fear No Evil") never went higher than position #61. On the average, the "median" song reached position #24 on the chart. Fifty percent (50%) of the songs reached position #20 or better, and sixty-five percent (65%) of the songs reached position #30 or better.

Armed with these figures, an expert in the recording industry was to testify regarding the additional number of record and album sales which could reasonably be expected if "Fear No Evil" were to reach positions #20 and #30, that is, were to climb the chart in an "average" manner. The expert was also prepared to testify that if "Fear No Evil" reached position #30 or better, the song would have achieved sufficient popular acceptance to arrange a nationwide concert tour, thereby generating significant additional revenues for plaintiff.

However, the court below ruled that the statistical analysis or "chart" (A-) prepared by plaintiff was inadmissible because it failed to rise above the level of

speculation. (A- ;T-379). Subsequently, Judge Owen elaborated on his ruling (A- ;T-398-99). In summary, he found that since plaintiff's chart failed to take into account the speed with which the songs moved up the charts, the jury would have to speculate about what significance reaching a position of #30 or better on the chart would have.

It appears that Judge Owen heavily relied upon two charts produced by defendants dealing with the time it took various songs to reach position #10 or better on the Billboard chart and the number of "bullets"* amassed during their climb. (A-). The Court uncritically accepted these charts in evidence, despite the fact that they were not introduced by the originator of the charts (who was not present in court) and were thus hearsay, (A- ;T-363-4) despite the fact that their sample included only one-third the songs included in plaintiff's chart, and despite the fact that they dealt solely with songs

* A bullet is a notation on the Billboard chart that shows a record has made a jump of a certain amount of space in a given week, and is indicative of a faster-than-average rise during that week.

that had reached position #10 or better, whereas it should have dealt with all songs that had reached position #30 or better.

Plaintiff respectfully submits that the exclusion of its chart and all testimony associated therewith is reversible error. While Judge Owen was aware of the applicable case law cited supra (A- ;T-378), he was acutely aware of the spectre of "speculation", so much so that his abiding interest in preventing speculation by the jury caused him to overstep the bounds of non-admissibility.

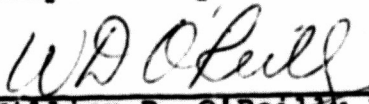
Throughout the course of the testimony on this matter, Judge Owen was pre-occupied with "speculation". Thus, he first stated that a 50/50 probability of reaching #20 is too speculative (A- ;T-275); then when plaintiff attempted to introduce chart evidence that "Fear No Evil" had a 65% chance of making position #30 on the Billboard chart, it was again excluded even though the Court recognized that it had a 2 to 1 chance of reaching #30 or better. (A- ; T-398). If 50/50 is speculation and 2 to 1 is also speculation, when does "speculation" end? At 75%? At 90%?

Plaintiff respectfully submits that it should have been afforded the opportunity to bring its proof on prospective (or "future") damages to the jury. The word "speculation" as used in the applicable case law is a "codeword" for a conclusion which has been reached regarding the evidence presented. Under the case law plaintiff was permitted to employ any reasonable means of proving future damages, once a wrong and actual damage was established. The Court found that the method presented by plaintiff was "unreasonable" as a matter of law (A ; T-368), and is therefore "speculation of the highest order" (A- ; T-1829). It is evident from the record that the jury, not Judge Owen, should have made the decision whether based on the evidence before it, the proof was reasonable as a matter of fact.

CONCLUSION

Accordingly, plaintiff respectfully requests this Court to reverse this ruling on non-admissibility of the evidence on prospective damages and to remand the case on this issue only.

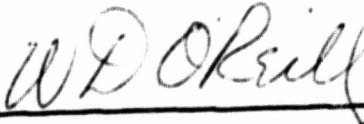
Respectfully submitted,


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Appellant-Cross-Appellant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on November 8, 1976, he served the within BRIEF upon defendant Famous Music Corporation by personal service of a copy thereof to:

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WILLIAM D. O'REILLY